

Submission on worker non-compete clauses and other restraints

Tech Council of Australia Submission

June 2024



1. Introduction

The Tech Council of Australia welcomes the Government's consideration of worker non-compete clauses as part of Treasury's Competition Review, and in particular, its consideration of the impact of non-compete clauses on labour market mobility and competition. The Tech Council recognises the importance of strong competition laws as a foundation for economic growth and driver of innovation across all industries. Competitive markets result in enhanced choices, reduced costs and improved quality for consumers.

The Tech Council supports the Government's objectives to create a stronger, more productive economy and to improve competition across the economy, resulting in more dynamic and innovative growth, including in the tech sector. To achieve these objectives, Australia needs to create the right conditions to boost productivity growth, which the Productivity Commission notes is at a 60-year low. Growing our tech sector will be a key part of the solution.

The Tech Council is Australia's peak industry body for the tech sector. The Australian tech sector is a key pillar of the Australian economy, employing 935,000 people. This makes the tech sector equivalent to Australia's seventh largest employing sector.

We represent around 160 companies from a diverse cross-section of Australia's tech sector, including companies working in business enterprise software, consumer software, telecommunications, fintech, venture capital and digital platform services. The organisations in our membership help to facilitate digitisation and productivity growth in our economy by providing core business functions to other companies of all sizes.

Australia's tech sector has some unique challenges when it comes to talent and workforce issues, that sets the tech sector apart from other sectors across the economy.

While Australia has some of the best tech talent in the world, we do not have enough tech workers. Tech skills shortages are particularly acute in technical occupations like software engineering, and it is especially hard to find experienced tech talent. Tech sector jobs are also outpacing growth in other occupations, as demonstrated in Figures 1 and 2 below. As a result, tech workers are in high demand in Australia, and are in a strong bargaining position when it comes to engaging with employers and future employers.

Figure 1: Long term growth in tech occupations¹

Index, where number of workers in August 1986 is equal to 100.

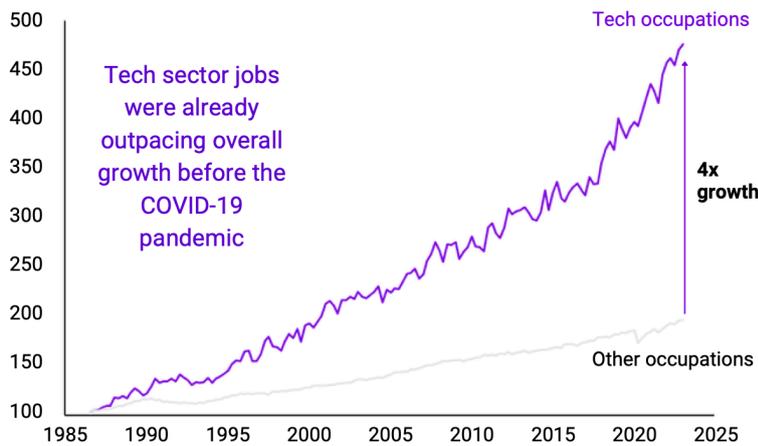
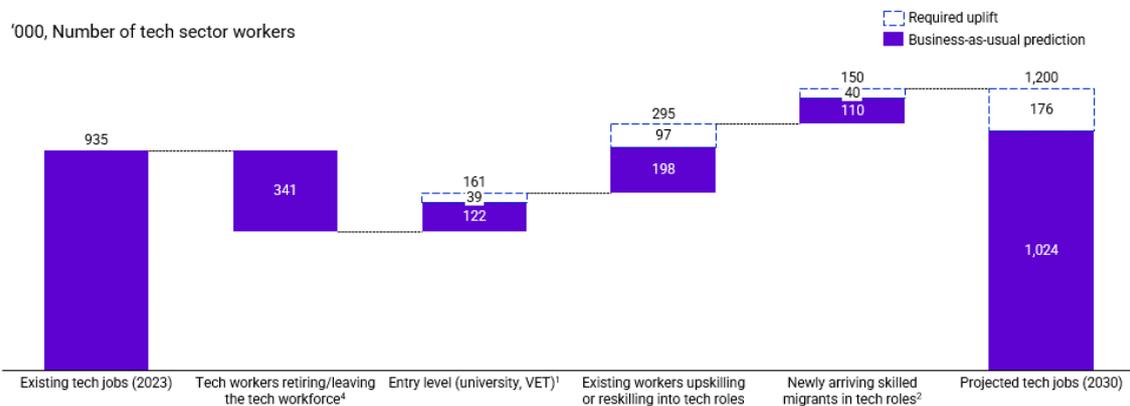


Figure 2: Projected tech sector jobs in 2030²



Sources: ABS, [Tech Council of Australia](#)

Further, Australia’s tech sector is unique in the way that successful tech companies have a history of their employees starting new tech companies, driving innovation and dynamism in the sector.³ This trend has created a generational effect, which enriches the tech landscape and broader economy with fresh ideas and entrepreneurial drive.

We strongly support job mobility for tech sector workers and consider that it is important that opportunity and growth is not restricted in the tech ecosystem. However, we do consider that non-compete clauses in employment contracts can play an important role in employment agreements for the tech sector in Australia.

This submission outlines the role that non-compete clauses can play in the tech sector in Australia, as well as highlights some of their current shortcomings, including a lack of transparency about their operation. These issues could be addressed through reforms to the

¹ Tech Council of Australia, [The State of Australia's Tech Ecosystem](#), March 2024

² Tech Council of Australia, [Tech Jobs Update](#), May 2023

³ Sydney Morning Herald, [Atlassian alumni launch next generation of startups](#), 3 August 2020 and Sydney Morning Herald, [Not sure what to cook with what’s left in the fridge? There’s AI for that](#), 11 December 2023

way that non-competes operate in Australia. We make four recommendations to Government:

- **Recommendation 1: Government should not ban the use of non-compete clauses or other restraint of trade clauses.**
- **Recommendation 2: Government should consider limiting or banning the use of cascading clauses.**
- **Recommendation 3: There is a role for improved education and guidance for employers and employees regarding the use of non-compete clauses.**
- **Recommendation 4: Government should consider the interaction between 'gardening leave' and non-competes.**

2. Non-competes can play an important role to tech companies

The use of non-competes by tech companies is complex, and nuanced. While overuse of non-competes may have the potential to limit job mobility, non-competes also play an important role.

In the tech sector, especially compared to other industries, non-competes are not consistently enforced. This is because for the vast majority of tech employees, the companies that compete for the same workforce are not direct competitors of each other. For example, a software engineer can easily apply their skills between different types of tech companies, such as moving between a consumer-facing platform to enterprise software – roles that would use the same skills that a software engineer has, but are applied to very different contexts. For this reason, non-competes are not often relevant to tech employees' employment decisions.

Tech jobs tend to be well remunerated and involve a highly skilled workforce that is in high demand. At present, where non-competes are present, they form part of the overall employment contract with the employee, in which employees are paid well for their employment. Any consideration of the effect of non-competes in Australia's tech should take account of the broader employment context for tech workers in Australia.

However, when non-competes are relevant, they can serve an important role to tech companies. Non-competes can legitimately protect an employer's customer or client base and protect confidential information. This is particularly the case where the IP generated by a tech company is held in the minds of employees. In this critical respect, non-competes offer employers in the tech sector with an important layer of contractual protection that other obligations (such as statutory prohibitions on the misuse of confidential information) cannot secure. Tech companies also have significant customer bases and customer lists where trade secrets (for example, pricing) is easily misappropriated by staff.

Even relatively junior levels can have access to highly commercially sensitive material in tech companies, for example where a junior software engineer has visibility over the algorithms that drive functionality on a tech company's platform. This means that any approach by Government that restricts the use of non-competes on the basis of either remuneration or an employee being at a particular level of seniority is not appropriate for use in the tech sector.

For start-ups, non-compete clauses in employee contracts can have varied impacts which could be positive or negative, depending on the circumstance:

- They can play a crucial role in protecting a start-up's IP and prevent competitors from acquiring that IP by simply employing another business' employees and allowing those individuals to make use of their former employers' IP (as opposed to the start-up receiving the benefit of that IP through either becoming a customer, or purchasing the start-up altogether); and
- Alternatively, they can prevent founders from being able to start a start-up, where that start-up is in direct competition with founders' previous employment, and that start-up benefits from the skills and information as a result of founders' previous employment.

This demonstrates that the impact of non-competes on competitiveness is not straight forward. In some instances, they may have a detrimental impact, and in other instances, they can be an essential safeguard to protecting legitimate business interests such as confidential information (which in turn can attract investment to startups, where investors feel like the value of the startup is sufficiently protected). Having robust restraints in key employee contracts can be a significant component of investor due diligence on a start-up before investment.

It's also important to recognise that Australia has a different employment context than some other countries around the world.

We are aware of comparisons to California, and the link drawn between California's banning of non-competes in employment contracts to the success of Silicon Valley tech companies. We do not consider that this is an appropriate comparison. The success of tech companies in Silicon Valley can be traced back to a complex mix of factors, not least of which is the funding and investment available for companies based there.

Most significantly, however, is that the employment context in Australia differs dramatically from the employment context and culture in California. In California, 'at-will' employment means that employees can have their employment terminated without notice. In that context, a ban on non-competes is an important protection for employees.

However, in Australia, the geography, history, culture and context of employment relationships is very different, where employees enjoy a much broader range of protections and employers, as a result, need the ability to protect their IP.

3. The current use of non-competes creates uncertainty for employees and employers

Notwithstanding that non-competes play an important role for tech companies in Australia, their current use in Australia could be improved. The inclusion of non-competes in employment contracts in Australia is relatively unrestricted (albeit governed by common law), and use of cascading non-compete clauses is common.

At present, employers have a strong incentive to include non-competes in their employee contracts, even if they are unlikely to be necessary or enforced. In the absence of other guidance and where, for example, competitors are also using non-competes, employers are likely to include them as boilerplate in employment contracts. A lack of disincentives to

employers in including broad non-compete clauses in employment contracts can result in over-use.

In particular, the reliance on cascading clauses in non-compete clauses in Australia creates uncertainty for both employers and employees. This is because it is very difficult for an employee or employer to understand the duration of a non-compete clause without a court ruling. The reliance on cascading non-compete clauses sets Australia apart from other international jurisdictions, and there may be a chilling effect to these clauses where employees do not know the length of time to which a non-compete is relevant.

4. Recommendations

This lack of transparency about the operation of non-compete clauses in Australia could be addressed through reforms to the way that non-competes operate in Australia. We make four recommendations to Government:

Recommendation 1: Government should not ban the use of non-compete clauses or other restraint of trade clauses

Given the important role that non-compete clauses and other restraints can play in protecting legitimate business interests, including for startups, we consider that a broad ban could have a dampening effect on the incentives for innovation and growth in the tech sector.

Any reforms in this area should be targeted and risk-based and mindful of Australia's unique employment context, the needs for tech companies to protect critical IP, and the relative infrequency with which non-compete clauses are able to be enforced in relation to employment within the tech sector.

Recommendation 2: Government should standardise the legal frameworks across Australia in relation to non-competes

The legal frameworks for non-compete clauses are not standardised across Australia, leading to increased uncertainty for employees and employers. A court being able to read down a non-compete clause means that cascading clauses do not need to be used in employment contracts. This exists in NSW under section 4(1) of the Restraints of Trade Act 1976, but is not uniform across other states.

Standardising the legal framework for non-compete clauses in employee contracts would improve certainty and clarity for both employers and employees.

Recommendation 3: there is a role for improved education and guidance for employers and employees regarding the use of non-compete clauses

As an important complement to standardising the legal frameworks for non-compete clauses, consider that there is a role for improved education and guidance for both employers and employees regarding the purpose of non-compete clauses. For example, both employers and employees should have access to simpler information about the circumstances in which a non-compete may become relevant. For workers that have a non-compete clause in their employment contract, Government could require that information or educational material be provided so that workers' attention is drawn to the existence of their non-compete and the impact that it could have, and make an employment decision accordingly.

At the moment, a lack of education around the operation of non-compete clauses may unnecessarily restrict employee choices about employment options. A key aspect of improved education around the use and application of non-compete clauses would mean that non-competes do not operate to prevent employees moving to a competitor to earn a living. A common misconception for non-compete clauses is that they restrict the ability of employees to earn a living, however, the reality is that they only apply to an employee going to a competitor or plan to misuse confidential information.

Recommendation 4: Government should consider the interaction between gardening leave and non-competes

Government should also consider the interaction between so-called 'gardening leave' and non-competes. In the United Kingdom, it is common practice for the (contractual) post-employment restraint period to be reduced by the amount of time that an employee spends on 'gardening leave' (during which they are still employed by the first employer). This means that, for example, if someone is subject to a 12-month non-compete period and a six-month notice period which is spent on gardening leave, they would only be restrained for a further six months, rather than 12 months following the cessation of their employment.

A similar system in Australia would achieve shorter restraint periods, while still protecting the legitimate interests of the employer.